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No. 82-1301

IN THE

Supreme Court of the United States

SUPREME COURT OF VIRGINIA
and ITS CHIEF JUSTICE,

Petitioners,

v.

CONSUMERS UNION OF THE UNITED STATES, INC. and VIRGINIA CITIZENS CONSUMER COUNCIL, INC.

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Did the District Court act within its discretion under 42 U.S.C. Section 1988 when it ordered state enforcement officers to reimburse prevailing private attorneys general for legal services required to secure injunctive relief against the enforcement of an unconstitutional code, after such an award had been explicitly authorized by the United States Supreme Court?

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Consumers Union of United States, Inc. and Virginia Citizens Consumer Council, Inc. ("Consumers Union")[1] oppose the petition for a writ of certiorari filed by the Supreme Court of Virginia and its Chief Justice ("Virginia Court").

[1]Consumers Union Foundation, Inc. may be an affiliate of Consumers Union of United States, Inc. and Virginia Citizens Consumer Council Fund, Inc. may be an affiliate of Virginia Citizens Consumer Council, Inc. under Rule 28.1.

I.

STATEMENT OF THE CASE

Consumers Union attempted to publish an attorney directory in 1974 to educate consumers about selecting legal counsel in Arlington County, Virginia. The directory was to include information on lawyers' backgrounds, areas of legal practice, types of clientele, billing practices and fees. The Virginia Code of Professional Responsibility, Rule 2-102(A)(6), prohibited lawyers from participating in such a directory. Attorneys who violated the Rule could be disciplined and their license to practice law could be suspended or revoked. Several members of the Virginia State Bar expressed a strong interest in listing in the directory but indicated they would not do so because of the Rule. The Consumers Groups recognized they could not collect information from most attorneys unless they secured a court order invalidating the Rule and enjoining its enforcement.

In 1975, Consumers Union instituted this action against the Virginia Court, Virginia State Bar ("Bar") and others. The complaint sought declaratory relief pronouncing the Rule unconstitutional and upholding the constitutional right of Consumers Union to gather information from attorneys and publish the directory. The complaint further sought a permanent injunction enjoining the Virginia Court and Bar from enforcing the Rule, costs and reasonable counsel fees.

On May 7, 1979, a three-judge District Court held the Rule to be unconstitutional on its face and the entire directory to be constitutionally protected. It also permanently enjoined the Virginia Court and Bar from enforcing the Rule. Since Consumers Union had prevailed, the District Court awarded it reimbursement from the Virginia Court

for attorneys fees and costs under 42 U.S.C. Section 1988. The District Court concluded that this award was not unjust in light of the Virginia Court's failure and refusal to amend the Rule after *Bates v. State Bar of Arizona,* 433 U.S. 350 (1977) established the Rule was unconstitutional.

On June 7, 1979, the Virginia Court appealed the order awarding declaratory and injunctive relief and attorney's fees against the Virginia Court. On appeal, the United States Supreme Court ("this Court" or "Supreme Court") upheld the part of the order awarding declaratory and injunctive relief.. *Supreme Court of Va.* v. *Consumers Union,* 446 U.S. 719 (1980). Because the Virginia Court possesses common law and statutory authority to enforce disciplinary rules against attorneys, the Supreme Court held that "the Virginia Court and its Chief Justice properly were held liable in their enforcement capacities." *Id.* at 736.

This Court vacated the fee award because the decision to award fees had been based on the Virginia Court's failure to amend the Rule, a legislative decision that was immune from legal challenge. However, the Supreme Court observed that Section 1983 judgments against enforcement authorities ordinarily carry with them an attorney's fees award under 42 U.S.C. Section 1988. *Id.* at 738. The Supreme Court therefore concluded that a fee award could be entered against the Virginia Court "because of its own direct enforcement role." *Id.* at 739.

On remand, the District Court applied the standards set forth in *Newman* v. *Piggie Park Enterprises, Inc.,* 390 U.S. 400, 402 (1968) that "a court ordinarily should award reasonable attorney's fees to a prevailing civil rights plaintiff unless special circumstances would render such an award unjust." After finding no such circumstances, the District Court held that the Virginia Court, having been

held liable in its enforcement role, was liable under 42 U.S.C. Section 1988 for legal fees required to secure that relief.

On appeal, the United States Court of Appeals for the Fourth Circuit upheld the District Court's exercise of its discretion under Section 1988 and noted that the Supreme Court had approved such a fee award. *Consumers Union of United States* v. *Virginia State Bar,* 688 F. 2d 218 (4th Cir. 1982).

II.

SUMMARY OF ARGUMENT

The fee award at issue in this case, having been expressly authorized by this Court in an earlier appeal, does not present any special or important issues that merit further review.

This Court held that Consumers Union properly prevailed against the Virginia Court in its direct enforcement role and should recover its attorneys fees under Section 1988 unless special circumstances render an award unjust. The District Court therefore acted within its discretion when it awarded fees to Consumers Union after finding no special circumstances and the Court of Appeals properly upheld that exercise of discretion.

III.

ARGUMENT

Consumers Union prevailed in securing all the relief it sought in this case against the Virginia Court in its enforcement role. Consumers Union brought this action for declaratory and injunctive relief barring enforcement of the Rule by the Virginia Supreme Court against attorneys who provided information for an attorney directory. The

District Court granted precisely that relief and the Supreme Court upheld that decision in an earlier appeal. *See supra* at 2-3.

As a prevailing plaintiff, Consumers Union is eligible for reimbursement for its attorneys fees under the Civil Rights Attorney's Fees Awards Act, 42 U.S.C. Section 1988, which provides:

> In any action or proceeding to enforce . . . section . . . 1983 . . . the Court, in its discretion, may allow the prevailing party a reasonable attorney's fee as part of the costs.

Applying this statute to this case, the Supreme Court concluded:

> Enforcement authorities against whom Section 1983 judgments have been entered would ordinarily be charged with attorney's fees. Because appellees [Consumers Union] properly prevailed in their Section 1983 action, [Section 1988] authorized the District Court, 'in its discretion,' to award them 'a reasonable attorney's fee.'

466 U.S. at 737-738.

The Supreme Court vacated the fee award entered in this case solely because it had been premised on decisions that were legislatively immune from challenge. However, it expressly authorized such an award in its statement: "[n]or would we disagree had the District Court awarded fees not only against the Bar but also against the Virginia Court because of its own direct enforcement role." *Id.* a 739. The Supreme Court properly did not enter an award since discretion to do so lies initially with the District Court.

On remand, the District Court held Consumers Union to be entitled to reimbursement from the Virginia Court

for legal services "performed to prevent the enforcement of the rule." The District Court carefully limited the award so that no compensation would be provided for efforts directed at the Virginia Court in its legislative capacity. That award clearly was within the discretion afforded the District Court under Section 1988.

In an attempt to defeat this fee award, the Virginia Court raises arguments that pertain to the merits of this case rather than the propriety of an attorney fee award. The Virginia Court, in effect, now challenges whether Consumers Union actually prevailed on the merits, an issue that has been decided by the Supreme Court and that cannot be reopened now. As stated in *In re Sanford Fork & Tool Co.*, 160 U.S. 247, 255 (1885):

> When a case has been once decided by this court on appeal, and remanded to the Circuit Court, whatever was before this Court, and disposed of by its decree, is considered as finally settled. The Circuit Court cannot vary it, or examine it for any other purpose than execution.

Accord Florida Avocado Growers v. *Paul*, 373 U.S. 132 (1963).

The Virginia Court asserts that the District Court on remand was obliged to take evidence on whether the Virginia Court exercised its enforcement powers. In the context of this case, no enforcement actions were required to cast a chill on Consumers Union's First Amendment rights. Attorneys would not provide Consumers Union with information for the directory due to the threat of enforcement actions. The Virginia Court therefore was never presented with an opportunity to exercise its enforcement powers. Nonetheless, since the threat of enforcement precluded Consumers Union from exercising First Amendment rights, the District Court granted declaratory and injunc-

tive relief barring enforcement actions by the Virginia Court and the Supreme Court upheld that order. The factual record in this case, having been sufficient to justify that relief, certainly was sufficient to support an award of attorneys fees for time devoted to securing the relief.

The Virginia Court further argues that unless the District Court found evidence of such enforcement actions no case or controversy could exist in this case. Again, this argument addresses the merits of this case, rather than the District Court's authority to grant a fee award. In the absence of a case or controversy, declaratory and injuctive relief could not have been granted against the Virginia Court. However, the Supreme Court upheld that relief and, moreover, expressly found a case or controversy to exist in this case.

> Of course, as *Boyle* v. *Landry, supra* and *O'Shea* v. *Littleton, supra,* indicate, mere enforcement authority does not create a case or controversy with the enforcement official, but in the circumstances of this case a sufficiently concrete dispute is as well made out against the Virginia Court as an enforcer as against the State Bar itself.

446 U.S. at 376, n. 15. If a sufficient case or controversy existed to support the District Court's jurisdiction on the merits, a sufficient case or controversy exists to support the fee award entered in this case.

The Virginia Court also argues that the Supreme Court's decision to remand the case without entering a fee award somehow establishes that the District Court on remand was required to gather additional factual evidence. This argument ignores the statutory scheme under Section 1988 which grants to the District Court the discretion to decide whether a fee award should be granted. The District Court

may decline to enter an award if it finds special circumstances that would render an award unjust. Then appellate courts may overturn a fee award decision only if the District Court has abused its discretion. Thus, the Supreme Court properly noted that an award could be granted against the Virginia Court in its enforcement role, but remanded the case so that the District Court could decide whether special circumstances existed and whether to exercise its discretion.

IV.

CONCLUSION

No issues are raised in the petition for a writ of certiorari that merit consideration and review by this Court. Each and every issue raised by the Virginia Court was decided by this Court in its earlier decision in this case. Moreover, the fee award at issue was well within the discretion of the District Court and was properly upheld by the Court of Appeals. The petition of the Virginia Court should be denied.

Respectfully submitted,

Consumers Union of
United States Inc. and
Virginia Citizens Consumer
Council, Inc.

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